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No. 06-1287

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In The

Supreme Court of the United States

CSX TRANSPORTATION, INC.,

Petitioner,

v.

STATE BOARD OF EQUALIZATION OF THE STATE OF GEORGIA; BART L. GRAHAM, AS COMMISSIONER OF REVENUE OF THE STATE OF GEORGIA; RUSSELL W. HINTON, AS STATE AUDITOR OF THE STATE OF GEORGIA; AND GENA L. ABRAHAM, AS DIRECTOR OF THE GEORGIA STATE PROPERTIES COMMISSION,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether a railroad may, in an action under 49 U.S.C. § 11501(b)(1) claiming that the State has overvalued the railroad's transportation property for tax purposes, challenge the appropriateness of the methods by which the State determined such property's true market value or is instead restricted to challenging the factual determinations to which the State's methods were applied.

PARTIES TO THE PROCEEDINGS

The parties before the Eleventh Circuit Court of Appeals included Georgia's State Revenue Commissioner and the Director of the Georgia State Properties Commission in their official capacities. While this litigation was pending in the district court Bart L. Graham succeeded T. Jerry Jackson as State Revenue Commissioner and was automatically substituted as a party pursuant to Fed. R. Civ. P. 25(d)(1). Ray J. Crawford passed away after CSX Transportation, Inc. filed its notice of appeal to the circuit court, and Gena L. Abraham was appointed to replace him as director of the Georgia State Properties Commission prior to the Eleventh Circuit's decision, resulting in her automatic substitution as a party pursuant to Fed. R. App. P. 43(c)(2).

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STATEMENT OF THE CASE

I. Nature Of The Litigation And Question Presented

Petitioner CSX Transportation, Inc. ("CSXT"), an interstate common carrier by rail, filed the instant action in September 2002 against the Georgia State Board of Equalization and its individual members, including the State Revenue Commissioner,[1] challenging the State's proposed assessment of the railroad's operating property for 2002 ad valorem tax purposes under Section 306 of the Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 54 (Feb. 5, 1976) ("the 4-R Act"), currently codified at 49 U.S.C. § 11501 ("Section 11501"). CSXT contended that the State's proposed assessment violated Section 11501(b)(1), which prohibits

> assess[ing] rail transportation property at a value that has a higher ratio to the true market value of the rail transportation property than the ratio that the assessed value of other commercial and industrial property in the same assessment jurisdiction has to the true market value of the other commercial and industrial property.

Pet. App. 75a. More specifically, CSXT argued that the State had significantly overvalued the railroad's transportation property, resulting in a ratio of assessed value to true market value for that property of approximately 55%, while other commercial and industrial property was assessed at only 40% of its value. Complaint, ¶¶ 21, 24.

In *Burlington Northern Railroad Co. v. Oklahoma Tax Comm'n*, 481 U.S. 454 (1987) ("*Oklahoma Tax*"), this Court

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[1] For simplicity purposes, the Respondents will also be referred to collectively as "the State."

held that Section 11501[2] permitted review by federal courts of alleged overvaluation of railroad properties by state tax authorities. The Tenth Circuit had upheld the dismissal of a railroad's complaint on the ground that a preliminary showing of intentional discrimination was required before such a claim could be considered. *See Burlington N. R.R. Co. v. Okla. Tax Comm'n*, 1986 U.S. App. LEXIS 36936 (10th Cir. May 2, 1986). *See also Oklahoma Tax*, 481 U.S. at 460-61. Oklahoma's taxing officials suggested to this Court "that [Section 11501] *never* permits district court review of such claims." *Id.* at 461 (emphasis in original). The Court rejected both positions. *Id.*

But the Court expressly left open the legal question presented here. Oklahoma's tax officials had derived the railroad's value by taking a weighted average of original cost and capitalized net operating income. *Oklahoma Tax*, 481 U.S. at 459. Although it ruled for the railroad, the Court noted that:

> Petitioner has not challenged the valuation *methodology* employed by respondents in determining the value of petitioner's railroad; petitioner's sole challenge is to the *application of that methodology*, particularly the State's evaluation of the cost of capital and the State's refusal to make deductions for property which petitioner claims is obsolete. Tr. Of Oral Arg. 15-16. This case therefore does not present the question of whether a railroad may, in an action under [Section 11501], challenge in the district court the

[2] At the time *Oklahoma Tax* was decided Section 11501 was codified as 49 U.S.C. § 11503.

> appropriateness of the accounting methods by which the State determined the railroad's value, or is instead restricted to challenging the factual determinations to which the State's preferred accounting methods were applied. Accordingly we express no view on that issue.

Oklahoma Tax, 481 U.S. at 463 n.5 (emphasis added). In this case the courts below decided that question in the State's favor.

II. The "True Market Value" Of CSXT's Transportation Property In Georgia

A. *The State's Proposed Assessment.* The Georgia Department of Revenue annually prepares a proposed assessment of CSXT's operating properties for each Georgia county in which the railroad has taxable property. Pet. App. 2a, 3a, 30a. In valuing CSXT's operating property for 2002 ad valorem tax purposes, the State used the unit rule, which the parties in this case agree is appropriate under Georgia law. Pet. App. 3a, 30a, 31a. Under the unit rule, the State first determined the value of the railroad as an entire operating system irrespective of where the operating property was located and without functional or geographic division of the whole into its component parts. *Id.*

The State's proposed assessment was based on an $8.2 billion unit value estimate for CSXT, from which $400 million was deducted to eliminate the effect of certain intangible assets. Pet. App. 5a, 32a. The adjusted unit value of $7.8 billion then was allocated to Georgia using the percentage of Georgia road miles to system road miles, resulting in an allocated value of $561,136,602. *Id.* To arrive at CSXT's Georgia taxable fair market value – $514,862,672 – the State deducted amounts for motor

vehicles (which are separately valued and assessed for ad valorem tax purposes), exempt pollution control equipment, and an exempt railroad line. *Id.* CSXT does not dispute the $400 million adjustment, the track-mile allocation percentage, or the deductions for motor vehicles, exempt pollution control equipment, and exempt line. *Id.* at 7a. Rather, CSXT contends that the railroad's system wide unit value was only $6 billion, resulting in a Georgia taxable fair market value of just $369,253,752. *Id.* at 7a, 36a.

Mr. Gregg Dickerson, the Revenue Department's Public Utility Manager, prepared the State's proposed assessment. Mr. Dickerson had worked at the Department of Revenue for approximately ten years preparing public utility valuations before leaving in 1993 to take a position in the tax department at Norfolk Southern Railroad. Pet. App. 3a, 4a, 31a. When Mr. Dickerson returned to government service in 2001 the State was calculating unit values using a yield capitalization method, a direct capitalization method, and a stock-and-debt method. *Id.* at 4a. For the tax year 2002, Mr. Dickerson replaced the first two methodologies with discounted cash flow ("DCF") and market multiples methods, but he kept the stock-and-debt method. *Id.*

Importantly, Mr. Dickerson also instituted a change in 2002 for railroads that was not needed for other public utilities: he began to use income figures taken from the companies' annual reports to shareholders instead of their regulatory reports to the Surface Transportation Board ("R-1 reports") to project future cash flows in his DCF analysis. Pet. App. 63a. As he explained at trial:

> [T]he state of Georgia, like most states, have [sic] historically relied on regulatory reports as our sources of income information and cost information. I found out . . . while working at Norfolk Southern that investors in the railroad . . . rarely even know what an R-1 is. It's not something that they look at in determining their analysis of a railroad company. They look at the annual reports to stockholders, the 10K's filed with the [SEC]. That was the type of information they were interested in, and . . . to replicate the actions of the market [in valuing the railroad], I thought they were a better source of income information.

Tr., Vol. 5, p. 774. CSX Corporation's Vice President and Controller acknowledged at trial that management's view of the railroad's financial performance was reflected in the annual report figures and not the R-1's. Pet. App. 63a; Tr., Vol. 6, pp. 886-88, 892. The figures in these reports can vary greatly,[3] and the largest part of the 47% increase in CSXT's 2002 assessment over 2001 was due to that change in the income amounts used to value the company. Pet. App. 63a.

Mr. Dickerson's DCF analysis yielded a 2002 unit value of $8.126 billion. Pet. App. 4a, 5a, 31a, 32a. His stock-and-debt method showed a unit value of $12.022 billion. *Id.* at 4a, 31a, 32a. Mr. Dickerson derived three indicators of CSXT's unit value using the market multiples

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[3] For example, CSX Corporation's annual report for 2001 showed that its rail segment had operating income of $743 million, but CSXT's R-1 report to the Surface Transportation Board reflected "net railroad operating income" of only $458 million for the same period. Tr., Vol. 5, pp. 776-78.

method, which yielded values of $12.346 billion, $10.769 billion, and $8.474 billion. *Id.* at 5a, 31a, 32a. Mr. Dickerson concluded that a unit value of $8.2 billion was at the lower end of the range within which CSXT's true value would lie, and he chose that value in order to be conservative and avoid litigation if possible. *Id.* at 5a; Tr., Vol. 2, pp. 215, 310, 326-27.

B. *CSXT's Appraisal.* CSXT relied on an appraisal by Mr. Thomas Tegarden in arguing that the State had significantly overstated the railroad's unit value for the 2002 tax year. Mr. Tegarden derived unit value estimates of $9.637 billion, $5.983 billion, and $6.15 billion using, respectively, a stock-and-debt method, a yield capitalization method, and a cost method. Pet. App. 41a. He gave no weight to the stock-and-debt method and little weight to his cost method in concluding that CSXT's unit value was only $6 billion. *Id.* at 7a, 36a, 41a.

III. The Rulings By The Courts Below

A. *The District Court.* Agreeing with the Fourth Circuit's decision in *Chesapeake Western Railway v. Forst*, 938 F.2d 528 (4th Cir. 1991), *cert. denied*, 503 U.S. 966 (1992) ("*Chesapeake Western*"), the district court held that it "[could not] consider Mr. Tegarden's valuation because it was prepared using different valuation methods than the Department." Pet. App. 37a n.8.[4] The court then carefully

[4] Nevertheless, the court expressed serious reservations about the unit value estimate of CSXT's appraiser, as it failed at least one straightforward test of reasonableness. "If, as CSXT claims, the value of CSXT was $6 billion, CSXT would have a negative equity value. CSX Corporation [the railroad's parent], however, held investment grade bond ratings implying a profitability level in excess of that needed to

(Continued on following page)

analyzed and rejected each of CSXT's myriad objections to the State's application of the DCF methodology, including the company's assertion that a 69% increase in free cash flow from 2001 to 2002 was "bizarre," that the railroad could not be expected to achieve an 80% operating ratio by the year 2011, that a 6.3% terminal growth rate was unrealistic, and that a "leased equipment" adjustment to the unit value was inappropriate. Pet. App. 48a-51a, 56a-59a.

The district court recognized that it had to "weigh the evidence and make its own factual findings regarding the true market value of CSXT." Pet. App. 44a. That process was succinctly described by the court as follows:

> After parsing through days of expert testimony, the court concludes that the Department's DCF value as set out in its Proposed Valuation is the most accurate indicator of CSXT's unit value. As a result, the court holds that, for purposes of applying the 4-R Act to the defendants' assessments of CSXT, the true market unit value of CSXT for the tax year 2002 was $7,726,293,350.

Pet. App. 59a.[5] Using the State's track-mile allocation percentage and deductions for motor vehicles and certain exempt property, the court found that "[t]he true market value of CSXT's taxable rail transportation property in Georgia for the tax year 2002 . . . was $509,560,171" and

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pay both current interest expenses and the principal balance of debt." Pet. App. 53a n.12.

[5] "The court arrived at this number by taking the Department's $8,126,293,350 DCF value for CSXT and subtracting $400 million to account for CSXT's intangible property." Pet. App. 59a n.23.

that there was no violation of Section 11501(b)(1). Pet. App. 59a-60a.

B. *The Eleventh Circuit's Decision.* The Eleventh Circuit affirmed the district court in a 2-1 decision. The Eleventh Circuit agreed with the district court and *Chesapeake Western* "that railroads may not challenge state valuation methodologies under subsection (b)(1) [of Section 11501]." Pet. App. 14a. The Eleventh Circuit recognized that a state's taxation authority is central to state sovereignty. Pet. App. 12a. *See also Department of Revenue v. ACF Indus.*, 510 U.S. 332, 345 (1994) ("*ACF Industries*"); *Dows v. City of Chicago*, 78 U.S. (11 Wall.) 108, 110 (1871) ("*Dows*") ("[i]t is upon taxation that the several States chiefly rely to obtain the means to carry on their respective governments"). The court also noted that "[t]he selection of a valuation methodology is part of this fundamental power of a state," Pet. App. 12a, and that long recognized "principles of federalism and comity generally counsel that courts should adopt a hands-off approach with respect to state tax administration," Pet. App. 12a-13a (quoting *National Private Truck Council v. Okla. Tax Comm'n*, 515 U.S. 582, 586 (1995) ("*National Private Truck Council*")). Accordingly, "a statute will not be construed to burden states in the exercise of their traditional powers unless it clearly states its intent to do so." Pet. App. 11a.

In the Eleventh Circuit's view, "[t]he text of [Section 11501] does not clearly state that railroads may challenge valuation methodologies. Without that clear statement of congressional intent, the argument of the Railroad fails." Pet. App. 14a. The court also looked to the statute's legislative history. The committee report on Senate Bill 927 (involving a precursor to Section 11501) provided that:

> *[the bill] does not suggest or require a State to change its assessment standards, assessment practices, or the assessments themselves.* It merely provides a single standard against which all affected assessments must be measured in order to determine their relationship to each other. It is not a standard for determining value; it is a standard to which values that have already been determined must be compared.

S. Rep. No. 1483, 90th Cong., 2d Sess. App. B, p. 22 (1968) (emphasis added). *See also* Pet. App. 14a; *Chesapeake Western*, 938 F.2d at 531. A railroad representative who testified during hearings on another earlier version of Section 11501 stated that "[t]he standards and methods of valuation that any State wishes to use would be unaffected by this legislation." *Hearing Before the Subcommittee on Transportation and Aeronautics of the Committee on Interstate and Foreign Commerce on H.R. 16245*, 91st Cong., 1st Sess. 138 (1970) (testimony of Philip M. Lanier). Pet. App. 14a. The Eleventh Circuit therefore found that "[t]he legislative history . . . supports the conclusion that railroads may not challenge state valuation methodologies in federal court." *Id.* at 14a. The Eleventh Circuit also upheld the district court's finding "that the appraisal prepared for the Railroad by Tegarden was based on a methodology different from the methodology used by the State." *Id.* at 17a.

The dissent agreed that there was no merit to the railroad's argument that its appraiser used the same methodology as the State. However, the dissent felt that Section 11501 permitted a railroad to challenge the State's methodology. *Id.* at 20a-23a. CSXT's petition for rehearing en banc was denied. *Id.* at 73a.

REASONS FOR DENYING THE PETITION

I. The Two Circuits That Have Addressed The Issue In Reviewing Final Decisions On The Merits Have Held That A Railroad May Not Challenge A State's Chosen Valuation Methodology Under 49 U.S.C. § 11501(b)(1)

CSXT asserts that there is now a "mature" 2-2 split between the Second and Ninth Circuits on the one hand, and the Fourth and Eleventh Circuits on the other, regarding the question left open in *Oklahoma Tax*, and that the divergence requires intervention by this Court. In fact, the Fourth and Eleventh Circuits are the only federal courts of appeal to have considered this issue in reviewing final decisions on the merits, and both courts have held that a railroad – although it may dispute the way in which a state applied a particular valuation methodology – cannot challenge the methodology itself. The Second Circuit has stated otherwise in a case that involved only the grant of a preliminary injunction, where the standard was whether "reasonable cause" existed to believe that a violation of the 4-R Act was about to occur, and where that test was met even when using the state's own value for the railroad property. The Ninth Circuit has yet to squarely address the issue. Respondents respectfully submit that a grant of certiorari is not warranted under these circumstances. The Second, Fourth, and Ninth Circuit cases are discussed below.

A. *The Fourth Circuit.* In *Chesapeake Western*, the Fourth Circuit considered the question left open in *Oklahoma Tax* and held that Section 11501 does not provide a basis for parties to challenge a state's chosen valuation methods:

> As an initial matter, we note that Congress has enacted a general proscription on federal interference in state taxation decisions. *See* 28 U.S.C. § 1341[6]; *Burlington Northern R.R. v. Lennen*, 715 F.2d 494, 498 (10th Cir. 1983). While [Section 11501] was passed as an express exception to the policy of non-interference, *id.*, we are not inclined to disregard this general policy in areas where [Section 11501] does not plainly authorize such an exception and where the federal courts are ill equipped to evaluate the merits of a challenge to a state taxation scheme. . . .
>
> The Supreme Court has held that [Section 11501] unambiguously provides a basis for railroads to challenge a state's calculation of the true market value of railroad property under whatever accounting system prevails in a given state. *Burlington Northern R.R. v. Oklahoma Tax Comm'n*, 481 U.S. at 461-63, 107 S.Ct. at 1859-61. On the other hand, the statute is not so explicit in explaining whether a railroad may challenge, in addition, the particular accounting method a state has determined to best estimate true market value. Since the statute is ambiguous on this latter question, we turn to the legislative history of [Section 11501].

Chesapeake Western, 938 F.2d at 531. The Fourth Circuit noted that "the history that does exist suggests that Congress did not intend for courts to displace the state's

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[6] The Tax Injunction Act, 28 U.S.C. § 1341, bars federal jurisdiction when the relief requested by the plaintiff would "enjoin, suspend, or restrain" the assessment, levy or collection of any tax under State law and the State affords a "plain, speedy and efficient remedy." *See also Fair Assessment in Real Estate Ass'n v. McNary*, 454 U.S. 100 (1981) (principle of comity acts as similar bar).

policy choice about what constitutes the best method for determining true market value of railroad land." *Id.*

The Fourth Circuit also recognized that "[t]he job of determining whether a particular valuation method produces a 'true' market value involves, at its core, a policy choice. The concept of true market value is inherently an approximation, in some sense a fiction, since there is no such thing as a perfect market." *Chesapeake Western*, 938 F.2d at 531. As explained by the district court in *Union Pacific Railroad Company v. State Tax Commission*, 716 F. Supp. 543 (D. Utah 1988), whose reasoning the Fourth Circuit embraced:

> The plaintiffs argue . . . that the statute itself requires this court to choose the correct valuation method from among the competing methods. They argue that the statute requires the court to determine their "true market value" and that the only way the court can do that is by determining which method gives the "true" true market value. That method is the one that is most reasonable and most accurate and hence arrives at the most correct result.
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> . . .
>
> Each expert asserts that his methodology results in a value that most closely responds to reality. However, absent a willing buyer and a willing seller, there is no absolute way to test the assertions of competing valuations or competing claims of correspondence to "true market value," if such a thing exists in the order of things.

Id. at 553. The Fourth Circuit described valuation as "an art, not a science," "a function of judgment, not of natural law," and said that "it is clear that there is more than one

way to value a railroad." *Chesapeake Western*, 938 F.2d at 532 (quoting *Union Pacific*, 716 F. Supp. at 554-55). Under these circumstances, "the railroads could not establish that their proposed methodology was, in some absolute sense, 'truer' than any other." *Chesapeake Western*, 938 F.2d at 532.

CSXT argued in the court below that the Fourth Circuit "partially retreated" from its holding in *Chesapeake Western* when it later decided *Richmond, Fredericksburg & Potomac Railroad Co. v. Forst*, 4 F.3d 244 (4th Cir. 1993) ("*RF&P*"). CSXT C.A. Br. at 37. CSXT now concedes that *RF&P* reaffirmed *Chesapeake Western*, Pet., p. 14, and that the rule is firmly established in the Fourth Circuit that "[Section 11501(b)(1)] does not provide a basis for railroads to challenge a state's preferred methodology for ascertaining the true market value of railroad property." *RF&P*, 4 F.3d at 248. "[A] railroad may present independent evidence of the fair market value of its property, provided . . . that it limits its evidence to factors that may properly be taken into account under the state's chosen methodology." *Id.* at 250.

B. *The Second Circuit.* In contrast to the Fourth Circuit's holding in *Chesapeake Western* and the opinion of the Eleventh Circuit in this case, the Second Circuit's decision in *Consolidated Rail Corp. v. Town of Hyde Park*, 47 F.3d 473 (2d Cir. 1995) ("*Conrail*") involved an appeal from the district court's grant of a preliminary injunction in favor of the railroad rather than a final decision on the merits. The Second Circuit began by stating that "[f]or such a statutory injunction, a railroad need only demonstrate that there is 'reasonable cause' to believe that a violation of the 4-R Act has occurred or is about to occur." *Id.* at 479. *Cf. Johnson & Johnson Vision Care, Inc. v.*

1-800 Contacts, Inc., 299 F.3d 1242, 1246 (11th Cir. 2002) (normally "the movant [for a preliminary injunction] must establish . . . a substantial likelihood of success on the merits"). There was no question in *Conrail* that "reasonable cause" had been shown, since "even if the defendants' true market value of $974 million is accepted, the resulting [assessment] ratio for Conrail would be 63% . . . and this too would be a violation of the 4-R Act." *Conrail*, 47 F.3d at 480. In other words, because the state's application of its own methodology resulted in a 4-R Act violation, injunctive relief clearly was appropriate. Furthermore, unlike the careful, detailed discussions of the "methodology" issue set forth in *Chesapeake Western* and the court below, that portion of the Second Circuit's opinion is a mere six sentences, which consist mainly of stating the question and the court's conclusion. *See id.* at 481-82. The court also seemed most influenced by the fact that New York had adopted what the Second Circuit characterized as "a special appraisal method for railroads alone" that would circumvent "the whole nondiscrimination objective of the statute."[7] *Id.* The parties eventually settled, prior to a final decision on the merits. *CSX Transp., Inc. v. New York State Office of Real Property Servs.*, 306 F.3d 87, 90-91 (2d Cir. 2002).

C. *The Ninth Circuit.* The Ninth Circuit's opinion in *Burlington Northern Railroad Co. v. Department of Revenue*, 23 F.3d 239 (9th Cir. 1994), affirmed a district

[7] Ironically, a "special appraisal method" is precisely what CSXT wants in this case. The district court found – and CSXT does not dispute here – that the State valued CSXT essentially the same way that it valued every public utility appraised under the unit rule. Pet. App. 62a.

court decision that largely upheld the State of Washington's valuation of a railroad's transportation assets.[8] On appeal, the railroad asserted that "in deferring to the state's choice of the valuation method used to set the market value of its property" the district court had wrongly relied on the Fourth Circuit's *Chesapeake Western* decision. But the Ninth Circuit stated that:

> *[w]e need not decide whether Chesapeake Western should be followed in this circuit.* Here, the district court cited *Chesapeake Western*, but it did not preclude Burlington Northern from challenging the state's method of valuation. The court allowed Burlington Northern to present evidence of the railroad's value based on other valuation methods.

Id. at 240-41 (emphasis added). Respondents respectfully submit that the circuit court below misapprehended the basis of the Ninth Circuit's decision, which it characterized as having "repudiated *Chesapeake Western*," Pet. App. 10a, and that the Ninth Circuit has not yet squarely addressed the question presented here.

However, the Ninth Circuit did squarely reject the railroad's assertion that the district court erred in attributing to the state's valuation a presumption of correctness that had to be defeated by "clear, cogent and convincing" evidence. *Id.* at 241. The court disagreed with the railroad that affording "substantial deference" to the state's valuation method violated the railroad's alleged right under the 4-R Act to establish the correct value "by any appropriate

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[8] The district court made only two adjustments to the state's value. *Id.* at 240.

valuation approach." *Id.* Notably, this is the same right claimed by CSXT here. Pet., p. 17 (stating that fair market value must be decided "based on *all* relevant evidence") (emphasis added); *id.* at 19 ("Section 11501 requires courts to determine the 'true market value' of railroad property based upon *any and all* competent evidence.") (emphasis added).

II. The Eleventh Circuit's Decision Is Correct

CSXT contends that "this Court's intervention is all the more imperative given the Eleventh Circuit's critical error in interpreting Section 11501." Pet., p. 16. However, the railroad's petition does not dispute much of the legal basis for the Eleventh Circuit's decision, *e.g.*, that a state's taxation authority is central to state sovereignty, Pet. App. 12a; *see also ACF Industries*, 510 U.S. at 345; *Dows*, 78 U.S. (11 Wall.) at 110 ("[i]t is upon taxation that the several States chiefly rely to obtain the means to carry on their respective governments"); that "[t]he selection of a valuation methodology is part of this fundamental power of a state," Pet. App. 12a; and that "principles of federalism and comity generally counsel that courts should adopt a hands-off approach with respect to state tax administration," Pet. App. 12a-13a (quoting *National Private Truck Council*, 515 U.S. at 586).

Nor does CSXT take issue with the well-established principle of statutory interpretation that the Eleventh Circuit applied in ruling for the State. As this Court pointed out in *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 242 (1985) ("*Atascadero*"), if Congress means to alter the "usual constitutional balance between the States

and the Federal Government" it must make that intention "unmistakably clear in the language of the statute." *Atascadero* went on to hold that States were not subject to suit in federal court by litigants seeking retroactive monetary relief under a statute providing that its remedies "shall be available to any person aggrieved by any act or failure to act by any recipient of Federal assistance" and where the State of California received such federal aid. *Id.* at 245-46. According to the Court, the statute failed to unequivocally express Congress' intent to abrogate the Eleventh Amendment bar to suits against the States in federal court. *Id.*

The "plain statement rule" has been described as "an acknowledgment that the States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere." *Gregory v. Ashcroft*, 501 U.S. 452, 461 (1991) ("*Gregory*"). For that reason, although "*Atascadero* was an Eleventh Amendment case, . . . a similar approach is applied in other contexts." *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 65 (1989). The Court used this rule of statutory construction in *Gregory* to hold that Missouri's mandatory retirement requirement for judges did not violate the federal Age Discrimination in Employment Act of 1967 ("ADEA"). The Court observed that "[t]he present case concerns a state constitutional provision through which the people of Missouri establish a qualification for those who sit as their judges. This . . . is a decision of the fundamental sort for a sovereign entity." *Gregory*, 501 U.S. at 460. The ADEA plainly applied to States as employers, *id.* at 464, but the Court would "not read the ADEA to cover state judges

unless Congress has made it clear that judges are included. This does not mean that the Act must mention judges explicitly, though it does not. [Citation omitted.] Rather it must be plain to anyone reading that Act that it covers judges." *Id.* at 467 (emphasis omitted).

Most importantly, this Court has recognized that the same rule of construction applies in interpreting Section 11501. In *ACF Industries*, the Court held that Section 11501(b)(4) – which prohibits the imposition of "another tax that discriminates against a rail carrier providing transportation" – does not limit a State's discretion to exempt non-railroad property from generally applicable ad valorem property taxes.

> Principles of federalism support, in fact compel, our view. [Section 11501] sets limits upon the taxation authority of state government, an authority we have recognized as central to state sovereignty. When determining the breadth of a federal statute that impinges upon or pre-empts the States' traditional powers, we are hesitant to extend the statute beyond its evident scope. We will interpret a statute to pre-empt the traditional state powers only if that result is "the clear and manifest purpose of Congress." As explained above, neither [the particular subsection] nor the whole of [Section 11501] meets this standard with regard to the prohibition of property tax exemptions.

ACF Industries, 510 U.S. at 345 (internal citations omitted).

Although *Oklahoma Tax* held that the express language of Section 11501(b)(1) plainly allows a railroad to

litigate the value placed by the state on the railroad's transportation property, the text does not clearly state that railroads may challenge both the way in which the state has applied a particular valuation method and the method itself, and the Eleventh Circuit properly refused "to extend the statute beyond its evident scope." That holding is supported by the 4-R Act's legislative history, to which this Court itself referred in *ACF Industries*, noting that:

> [the taxpayers could not] draw our attention to a single instance in the 15-year legislative history of the 4-R Act in which representatives of the railroad industry expressed concern about discriminatory property tax exemptions. In fact, when urging the Senate to adopt [that portion of Section 11501], industry representatives characterized the provision as prohibiting only discriminatory in lieu taxes and gross receipts taxes; property tax exemptions, in contrast, were not mentioned.

ACF Industries, 510 U.S. at 346. Section 11501's legislative history is similarly revealing on the question presented here. An industry representative who testified during committee hearings stated that "[t]he standards and methods of valuation that any State wishes to use would be unaffected by this legislation." *Hearing Before the Subcommittee on Transportation and Aeronautics of the Committee on Interstate and Foreign Commerce on H.R. 16245*, 91st Cong., 1st Sess. 138 (1970)) (testimony of Philip M. Lanier). A committee report also stated that "[the bill] does not suggest or require a State to change its assessment standards, assessment practices, or the assessments themselves." S. Rep. No. 1483, 90th Cong., 2d

Sess. App. B, p. 22 (1968). While not extensive, this background fully supports the Eleventh Circuit's decision.

CSXT has asserted that the ruling below deprives a railroad of any meaningful opportunity to litigate its fair market value in a lawsuit under Section 11501(b)(1). The trial in this case belies such hyperbole. During the eight days of testimony, not a single witness – with the exception of Mr. Tegarden himself – spoke at any length in support of the railroad's appraisal. Instead, CSXT focused its time and considerable resources, including five expert witnesses, on attacking the State's appraiser and the way he applied the State's valuation methodologies. The company challenged the "comparability" of the Class I railroads that Mr. Dickerson selected to estimate CSXT's unit value under the "market multiples" method; his stock-and-debt method; virtually every assumption made by Mr. Dickerson in applying the DCF method, including the terminal growth rate and projected operating ratio in year 2011; and Mr. Dickerson's "leased equipment" adjustment. Pet. App. 47a-59a. There is no merit to CSXT's claim that the district court effectively denied the railroad a chance to litigate its fair market value; the court simply refused to substitute CSXT's valuation method for the State's, and it methodically rejected the company's criticisms regarding the State's application of the DCF. The Eleventh Circuit's decision allows railroads wide latitude to show that a state has miscalculated the "true market value" of their transportation property, without extending Section 11501 into matters of state tax administration that are beyond the statute's "evident scope."

III. CSXT's Allegations Of "Recent Rapid And Aggressive Escalation Of State Property Valuations" That It Attributes To The Holdings Of The District Court And Eleventh Circuit In This Case Are Unsupported By The Record

Finally, CSXT attempts to attribute an improper "escalation of [its] state property valuations" to the holdings of the district court and Eleventh Circuit in this case, asserting that "there is already evidence that state appraisers are becoming bolder in their determinations of 'true market value' for railroads running through their States" and that this Court must act to "rectify the state methodology abuses that are currently [being] practiced." Pet., pp. 19, 20, 22. CSXT points to its 2006 property tax assessments in Georgia and Florida and claims that both states "adopted CSXT unit values . . . which far exceeded the average value . . . in the other States in the Fourth and Eleventh Circuits that use the unit value method." Pet., p. 22.

Nothing concerning CSXT's 2006 property tax situation – whether in Georgia, Florida, or any other state – is part of the record in this case. CSXT's complaints in this regard therefore should just be ignored. *See generally Rosewell v. LaSalle Nat'l Bank*, 450 U.S. 503, 518 n.22 (1981) ("Because these additional facts are not part of the record before us, we have not considered them.") Furthermore, while this Court ordinarily presumes that public officials have "properly discharged their official duties," *Bracy v. Gramley*, 520 U.S. 899, 909 (1997) (quoting *United States v. Chemical Found., Inc.*, 272 U.S. 1, 14-15 (1926)), CSXT takes a virtually opposite view. The company complains of "self-interested valuation methods employed by state tax agencies," insisting that it has been

the victim of an "aggressive and discriminatory escalation of railroad valuations and tax burdens," simply by pointing to tax increases from one year to the next in a particular state or comparing one state's unit value for the company to another's.[9] Pet., p. 22. As the Ninth Circuit observed in *Burlington Northern Railroad Co. v. Department of Revenue*, 23 F.3d at 241, in affirming the district court's refusal to admit evidence of other states' valuations in a Section 11501 challenge:

> Some of the figures reflecting the valuations other states had placed on Burlington Northern's nationwide transportation property resulted from negotiations between Burlington Northern and various state officials. These figures represented compromise values which, as the district court noted, would be only marginally relevant to show that Washington's valuation of Burlington Northern's nationwide property was incorrect. Moreover, had the district court admitted some or all of these figures into evidence, the state most certainly would have sought to examine witnesses to ascertain just how the various other states' valuations were determined. Such a challenge would have extended the trial by a considerable period without appreciable benefit.

What the record in this case does show, however, is a situation where a large tax increase was warranted. Throughout this litigation CSXT has tried to make much of the fact that from 2001 to 2002 its Georgia property tax

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[9] It is noteworthy that even under CSXT's view of Section 11501's scope, federal judges in the states where the company might challenge its property tax valuations could find different unit values for the same tax year.

assessment went up significantly. *See, e.g.*, Pet., p. 7 ("The appraiser's 2002 overall unit value for CSXT of $8.2 billion was 47.1% higher than the 2001 valuation."); *id.* at 20 ("the 2002 Georgia taxable value for CSXT was $514.9 million, 36.3% higher than the 2001 value.") But the district court correctly observed that:

> [t]he fact that [the railroad's] 2002 assessment was 47.1% higher than its 2001 assessment, and that this percentage increase is much higher than the percentage increase of other centrally-assessed taxpayers, does not in and of itself show that CSXT has been discriminated against. An equally likely proposition is that CSXT was undervalued in 2001.

Pet. App. 62a. The State's appraiser also testified that the largest part of the increase in CSXT's 2002 assessment was due to his use that year of income figures taken from the annual reports to shareholders instead of R-1 reports to the Surface Transportation Board to project future cash flows in his discounted cash flow analysis. Pet. App. 63a. That change essentially was endorsed by CSX Corporation's own Vice President and Controller, who acknowledged at trial that management's view of the railroad's financial performance was reflected in the annual report figures and not the regulatory reports. Pet. App. 63a; Tr., Vol. 6, pp. 886-88, 892.

In addition, the State's appraiser selected a unit value that was at the lower end of the range within which CSXT's true value would lie in order to be conservative and avoid litigation if possible. Pet. App. 5a; Tr., Vol. 2, pp. 215, 310, 326-27. The record in this case reflects a conscientious effort by state officials to arrive at a reasonable assessment, not the adoption of what CSXT considers a

"breathtakingly high unit value" designed to extract from the railroad more than its fair share of property taxes.

CONCLUSION

For the reasons above, the Respondents respectfully submit that the petition for writ of certiorari should be denied.

Respectfully submitted,

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